United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter :

:

-of- 74-1101

:

ALPHONSE PERSICO, :

Appellant.

STATEMENT OF ISSUES

1) In defense to a contempt citation, where it is conceded that a grand jury witness is being questioned as a result of the electronic interception of his own conversations, is the witness entitled to litigate the legality of the electronic surveillance?

2) What is the scope of the hearing to determine whether 18 USC § 2515 has been violated by the disclosure of unlawful electronic interceptions before a grand jury?

3) Does 18 USC §1826(a) make punishable as summary contempt an orderly refusal to testify before a grand jury so that the provisions of R 42(b) F.R. Cr. P. are not available in defense to a civil contempt citation?

4) Was the explanation of the scope of the immunity given by government counsel sufficiently incomplete so as to require vacating the order of contempt?

STATEMENT OF THE CASE

In the Spring of 1973 an electronic surveillance device was installed in appellant's home at 1409 Bath Avenue, in Brooklyn. As required by 18 U.S.C. § 2518(8)(d) the appellant later received notice of this surveillance.[1]

Subsequently, the appellant was served with a subpoena requiring him to appear before a grand jury sitting in the Eastern District of New York on January 23, 1974.[2]

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1 The appellant commenced a civil action in the Federal District Court for the Eastern District of New York in August, 1973 to compel disclosure of the electronic surveillance and suppress its use in evidence against him. In a memorandum opinion the Hon. John F. Dooling held that the application was premature since there was no anticipated use of the electronic surveillance which could be ordered suppressed, In Re Persico, 362 F. Supp. 713 (E.D.N.Y. 1973).

2 Appellant's subpoena was originally returnable in December, 1973 and was adjourned, on application of the appellant, until January 9, 1974. On that date the grand jury did not obtain a quorum. Although appellant was not sworn as a witness, the Honorable Orrin G. Judd heard applications of the appellant on that date.

Appellant appeared and was sworn as a witness. After asserting his Fifth Amendment privilege not to testify appellant was informed that immunity had been conferred on him by order of the Honorable John R. Bartels on September 28, 1973 (13-14).*

Appellant then refused to answer on the ground that the questions being put to him and his very presence as a witness were the fruits of the unlawful electronic surveillance of his home, specifically relying on 18 U.S.C. § 2515, Rule 41f and the opinion of the Honorable John F. Dooling issued January 2, 1974, In re Vigorito, a copy of which is annexed hereto (14).

The government acknowledged that electronic surveillance devices had been installed at appellant's home pursuant to a court order signed March 21, 1973 authorizing interceptions for 15 days. Extension orders were signed on April 9 and May 8, 1973, each authorizing interceptions for 15 days (9).

The specific question the appellant declined to answer was:

"Question: Mr. Persico are you employed?" (13)

Judge Judd held that there was an insufficient showing that the particular question was predicated upon the surveillance

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* Numbers in parenthesis refer to pages of the transcript of the proceedings had in the District Court on January 23, 1974.

of appellant's home and ordered appellant to respond (16-17). The appellant returned to the grand jury and answered all questions concerning his lawful employment (20-22). After this series of questions appellant was asked:

> "Question: Are you employed in any other occupation or do you own any business?" (22).

Appellant again refused to answer on the ground that the questions relating to the appellant's employment were the fruits of the electronic interceptions. Government counsel admitted that the proposed questions were based on electronic surveillance:

> "Mr. Del Grosso: There are questions that have been formulated as a result of electronic surveillance which will deal with his employment. Yes, that is true, your Honor." (17). (See also 18).

The appellant then moved for production of the wiretap orders and supporting affidavits for counsel's inspection so that counsel could make a determination whether the witness had "just cause", within the meaning of 28 U.S.C. § 1826(a), to refuse to answer based on the facial invalidity of the orders (27-28).

The Court refused this relief and instead examined the orders in camera, a procedure which appellant contended was inadequate (28-30). In part, the Court bottomed its action on the theory that Gelbard v. United States, 408 U.S. 41 (1972) had been limited by United States v. Calandra, ____ U.S. ____, 14 Cr. L. 3061 (1974), rejecting appellant's contention that Calandra specifically exempted from its coverage the statutory remedy of § 2515 and was bottomed exclusively on the Fourth Amendment (31 and 35). The Court did indicate, however, that it was entertaining the appellant's motion to suppress and denying it (40).

The witness was ordered to return to the grand jury and answer the question. This he did. Appellant answered questions pertaining to his own gambling activities (44-48). He was then asked:

> "Question: The question was, who were the individuals who worked for you?" (47).

The appellant refused to answer this question on the ground that he believed it derived from the unlawful electronic

surveillance of his home and on the ground that the immunity conferred, as explained, was not commensurate with his Fifth Amendment privilege. (48) (Tr. Jan. 24, 1974, '10).

Appellant was again brought before the district judge who held him in contempt and sentenced him to 60 days in jail. Counsel then moved for a hearing pursuant to Rule 42(b) F.R. Cr.P. (51). The court ordered a hearing but remanded the appellant (53). The court indicated that the appellant could purge the contempt before the expiration of the 60 days by answering and that the contempt was pursuant to 28 U.S.C. § 1826(a).

On the following day, at a hearing the appellant attempted to defend against the contempt citation by demonstrating that the questions put to him were the fruits of unlawful electronic surveillance in violation of 18 U.S.C. § 2515. The appellant again renewed his motion to suppress seeking production of the wiretap orders and supporting papers. The application was again denied as was the appellant's application for bail pursuant to 28 U.S.C § 1826(b). This Court denied the appellant's application for bail, after argument, on January 28,

1973. At present the appellant is confined at the Federal Detention Headquarters.

ARGUMENT

POINT I

18 USC §2515 PROVIDES "JUST CAUSE" FOR A GRAND JURY WITNESS TO REFRAIN TO ANSWER QUESTIONS PREDICATED ON THE UNLAWFUL INTERCEPTION OF HIS OWN CONVERSATIONS

This appeal presents important issues concerning the rights of a grand jury witness to refuse to answer questions based on unlawful electronic surveillance and the scope of the witnesses rights to litigate the legality of such surveillance.

The operable facts are not in dispute.

Appellant's home was "bugged" for approximately 45 days during the spring of 1973 and during this time his conversations were intercepted.[4]

Appellant was then subpoenaed before a grand jury and refused to answer on the ground that the questions were the

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4 The inventory served on appellant indicated there were no interceptions during the period of the first surveillance order though conversations were intercepted during the time of the two renewal orders.

product of unlawful electronic surveillance. The government has conceded that the questions asked of appellant resulted from the bugging of appellant's home.

The legal contentions are also narrowly drawn. Appellant does not predicate his right to refuse to answer on the Fourth Amendment. United States v. Calandra, ____U.S.____ (January 8, 1974) has laid to rest the contention that the fruits of an unlawful search and seizure, not involving unlawful electronic surveillance, are inadmissible before a grand jury. Calandra, however, recognized and distinguished the statutory rights upon which appellant relies ____ U.S. ____ n.11:

> "The dissent's reliance on Gelbard v. United States, 408 U.S. 41 (1972), is misplaced. There, the Court construed 18 U.S. § 2515, the evidentiary prohibition of Tit. III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, as amended, 18 U.S.C. §§ 2510-2520. It held that § 2515 could be invoked by a grand jury witness as a defense to a contempt charge brought for refusal to answer questions based on information obtained from the witness' communications alleged to have been unlawfully intercepted through wiretapping and electronic surveillance. The Court's holding rested exclusively on an interpretation of § 2515 and Tit. III, which represented a congressional effort to afford special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance. There was

> no indication, in either Gelbard or the legislative history of Tit. III, that § 2215 was regarded as a restatement of existing law. As Mr. Justice White noted in his concurring opinion in Gelbard, §2515 "unquestionably works a change in the law with respect to the rights of grand jury witnesses . . . ."
> 408 U.S. 69, 70
> [emphasis added]

Also not in issue here is the right of a grand jury witness, who has not been held in contempt, to litigate the legality of the electronic surveillance which forms the basis for his questioning. Thus, reliance on cases such as Cali v. United States, 464 F.2d 475 (1st Cir. 1972) is misplaced and clouds the issue. The Cali court held that, before being held in contempt, a grand jury witness could not move to suppress evidence but squarely recognized the right to move to suppress in defense to a contempt proceeding, 464 F.2d, at 478-479:

> "We therefore hold that, whatever rights a witness may have in a defense to a contempt proceeding, he may not anticipate such a proceeding by bringing a motion to suppress evidence before the grand jury. This result strikes a balance between the requirements of the federal wiretap statute and the efficient functioning of the grand jury. It allows

the grand jury to proceed, uninterrupted by lengthy suppression hearings unless and until the power to compel testimony is invoked. The aggrieved grand jury witness is not left without remedies for the unlawful interception. While remedies other than suppression may be less efficacious in protecting individual rights, it must be remembered that the Omnibus Act provides greater protection than previously existed."

[emphasis added]

Parenthetically, it should be noted that relief short of a full blown motion to suppress has been accorded pre-contempt grand jury witnesses.

In Re Vigorito, ___ F. Supp. ___ (E.D.N.Y.) (memorandum and order January 2, 1974, reconsideration denied January 14, 1974 and January 30, 1974), grand jury witnesses were compelled to give voice exemplars which the government intended to compare with electronic interceptions made pursuant to court order for the purpose of establishing the identity of the voices intercepted. The witnesses urged that the electronic surveillance was unlawful and moved to suppress their use before the grand jury. Judge Dooling held that, while a full blown motion to suppress was not proper at that stage of the proceeding, the government must disclose to counsel for the witnesses the orders and supporting papers authorizing the interceptions.

In this case appellant moved for such relief, pursuant to Vigorito, before refusing to answer questions. The district court denied that application.

In contrast to these questions, the issue presented in this appeal is whether a grand jury witness, in contempt proceedings under 18 USC § 1826(a), may defend on the ground that the question put to him violated 18 USC § 2515 because they were the result of unlawful electronic surveillance. More accurately, since that precise question was answered affirmatively by the Supreme Court in Gelbard v. United States, 408 U.S. 41 (1972), the issue this Court must decide is the scope of the hearing which must be afforded appellant to litigate the legality of the bugging of his home.

That the Supreme Court has decided the predicate issue in appellant's favor is clear. Gelbard involved two sets of petitioners in different factual postures. Gelbard had been adjudged in civil contempt pursuant to 28 U.S.C. § 1826 after refusing to answer questions which he contended were based on unlawful electronic surveillance. Gelbard had been informed that the surveillance was pursuant to court order, 408 U.S. at 44. He sought an opportunity

to challenge the legality of the interceptions which was denied him. The Ninth Circuit affirmed the order of civil contempt. This order was reversed by the Supreme Court.

Egan had been adjudged in civil contempt pursuant to 28 U.S.C. § 1826 for refusing to answer questions which she contended were predicated on unlawful electronic surveillance after receiving transactional immunity. The government refused to confirm or deny the existence of such electronic surveillance. The district court adjudged Egan in contempt. The Third Circuit reversed this order. The Supreme Court affirmed.

As phrased by the Supreme Court two main issues were resolved in Gelbard:

> "The question presented is whether grand jury witnesses, in proceedings under 28 U.S.C. §1826(a) are entitled to invoke this prohibition of § 2515 as a defense to contempt charges brought against them for refusing to testify. . . . the Court of Appeals for the Ninth Circuit held that they are not entitled to do so . . . The Third Circuit, en banc, reached the contrary conclusion . . . We disagree with the Court of Appeals for the Ninth Circuit and agree with the Court of Appeals for the Third Circuit."
>
> 408 U.S. at 43-44

The related issue was:

". . . whether a showing that interrogation would be based upon the illegal interception of the witness' communications constitutes a showing of 'just cause' that precludes a finding of a contempt."

408 U.S. at 45.

This question likewise was answered in the affirmative.

In simplest terms the Court decided in Gelbard that 18 U.S.C. § 2515 prohibited the compulsion of testimony before a grand jury where the questions were predicated on unlawful electronic surveillance. Secondly, the Court decided that if the questioning was based upon unlawful electronic surveillance the witness had "just cause" to refuse to answer and could not be held in contempt pursuant to 28 U.S.C. § 1826(a). Third, the Court held that 18 U.S.C. § 2518 (10)(a) does not permit the making of a motion to suppress evidence before a grand jury so as to prevent indictment based on illegal electronic surveillance or to dismiss an indictment predicated on illegal electronic surveillance because grand juries are exempted from the forums enumerated in §2518. "But it does not follow from the asserted omission of grand jury proceedings from the suppression

provision that grand jury witnesses cannot invoke § 2515 as a defense in contempt proceedings under 28 U.S.C. §1826(a)" 408 U.S. at 59. (Emphasis added). The Court thus held, that the remedy is to move to suppress, in court, in defense to the contempt proceedings. 408 U.S. at 60-61.

Frequently, when confronted with this problem, the government has advanced the position that if the electronic surveillance was conducted pursuant to court order the witness is without just cause to refuse to answer. This position lacks any legal or logical foundation.

§ 2515 provides that evidence drived from intercepted communications may not be received before any grand jury "where the disclosure of that information would be in violation of this chapter." It is beyond question that disclosure is violative of the statute if electronic surveillance is unlawful either because it was not pursuant to court order or because the court order did not comply with the requirements of the act. It is ludicrous to suggest that §2515 bars admission of one type of unlawful evidence before the grand jury but not the other.

This is supported by the holding in Gelbard since Gelbard himself had been informed that the electronic surveillance was pursuant to court order.

Thus, no purpose would have been served by vacating the contempt order as to Gelbard if the existence of a court order terminated his rights to litigate the legality of the electronic surveillance.

The legislative history of § 2515 also reveals that Congress intended the section to protect against invasion of privacy from unlawful electronic surveillance regardless of the nature of the illegality:

> "Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. The provison must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly (Nardone v. United States, 58 S.Ct. 275, 302 U.S. 379 (1937) or indirectly obtained in violation of the chapter. (Nardone v. United States, 60 S.Ct. 266, 308 U.S. 338 (1939).)

> There is, however, no intention to change the attenuation rule. See Nardone v. United States, 127 F.2d 521 (2d), certiorari denied, 62 S.Ct. 1296, 316 U.S. 698 (1942); Wong Sun v. United States, 83 S.Ct. 407, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression role beyond present search and seizure law. See Walder v. United States, 74 S.Ct. 354, 347 U.S. 62 (1954). But it does apply across the board in both Federal and State proceeding. Compare Schwartz v. Texas, 73 S.Ct. 232, 344 U.S. 199 (1952). And is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. Compare Adams v. Maryland, 74 S.Ct. 442, 347 U.S. 179 (1954); Mapp v. Ohio, 81 S.Ct. 1684, 367 U.S. 643 (1961). The provision Thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications.
>
> [Emphasis added]

1968 US Code Cong. & Admin. News at 2184-2185.

It is unthinkable in light of the broad sweep of the statute's language and the equally broad explanation of statutory purpose in the legislative history, that Congress did not intend the exclusiary rule of § 2515 to apply where interceptions were pursuant to court order. Nothing in logic or language or case law supports this view.

The essence of the Court's opinion in Gelbard is that, in defense to a contempt proceeding a witness may demonstrate that he had "just cause" to refuse to answer because the questions were predicated on unlawful electronic surveillance in violation of the clear mandate of 18 U.S.C. § 2515. Accord, People v. Mulligan, 40 A.D. 2d 165, 338 N.Y.S.2d 488 (1st Dept. 1972). Clearly appellant is entitled to litigate the legality of the bugging of his home. Absent an opportunity to do so, his refusal to answer does not constitute contempt within the meaning of 18 USC § 1826(a).

POINT II

APPELLANT IS ENTITLED TO A PLENARY HEARING TO DEMONSTRATE THAT § 2515 HAS BEEN VIOLATED

It follows that just as the exclusory sanction of §2515 forbids the admission of unlawful electronic surveillance before a grand jury, regardless of the nature of the illegality, so too appellant is not limited to a defense predicated on the facial invalidity of the wiretap orders. Rather, he is entitled to demonstrate whatever illegalities may have occurred in the institution and execution of the surveillance.

Again, the very wording of § 2515 supports this view. The section provides not only for the exclusion of unlawful interception but provides that "no evidence derived therefrom may be received in evidence before any grand jury. The statute affords protection against tainted evidence as that concept is defined in the Fourth Amendment area. See 1968 U. S. Cong. & Admin. News, supra. Since the statute mandates such an exclusion of tainted evidence, the appellant must be afforded a hearing to demonstrate taint.

The legislative history of § 2518(10)(a) also supports the view that the defense afforded by § 2515 entails a full motion to suppress:

> "Paragraph (10)(a) provides that any aggrieved persons, as defined in section 2510(11), discussed above, in any trial hearing or other proceeding in or before any court department, officer, agency, regulating body or other authority of the United States, a State, or a political subdivision of a State may make a motion to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom. [This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515] Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. (Blue v. United States, 86 S. Ct. 1416, 384 U.S. 251 (1965).) There is no intent to change this general rule. It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding. Nor is there any intent to grant jurisdiction to Federal courts over the Congress itself. See Hearst v. Black, 66 App. D.C. 313, 87 F.2d 68 (1936). Otherwise, the scope of the provision is intended to be comprehensive. [The motion may be made on the ground that: (i) the communication was unlawfully intercepted, (ii) the order of authorization or approval is insufficient on its face, or (iii) the interception was not made in conformity with the order. The

> motion must be made before the trial, hearing or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion, for example, when no notice was given under paragraph (9), discussed above]. Care must be exercised to avoid having a defendant defeat the right of appeal under paragraph (b), discussed below, by waiting until trial. (Giacona v. United States, 257 F. 450 (5th), certiorari denied, 79 S.Ct. 113, 358 U.S. 873 (1958).) Upon the filing of such a motion to suppress, the court may make available to the person or his counsel such portions of the intercepted communications or evidence derived therefrom as the court determines to be in the interest of justice. This provision explicitly recognizes the propriety of limiting access to intercepted communications or evidence derived therefrom according to the exigencies of the situation. The motion to suppress envisioned by this paragraph should not be turned into a bill of discovery by the defendant in order that he may learn everything in the confidential files of the law enforcement agency. Nor should the privacy of other people be unduly invaded in the process of litigating the propriety of the interception of an aggrieved person's communications.
>
> 1968 U.S. Code Cong. & Admin. News, at 2195
> [emphasis added]

Section 2518(10)(a) provides the procedural vehicle for the defense contemplated by § 2515 when a grand jury witness is held in contempt for refusing to answer questions predicated on unlawful electronic surveillance. As noted in Gelbard the two sections must be

read together. Thus, the scope of the motion to suppress available under § 2515 is that embodied in § 2518(10)(a).

Opponents of this view that a full motion to suppress is available often contend that such proceedings interrupt the smooth functioning of the grand jury. This objection lacks merit. Once a witness has been held in contempt he is removed from the stream of the grand jury's proceedings. Absent the opportunity to demonstrate his "just cause" the witness may remain in custody without further contact with the grand jury. Congress, however, by creating special legislation more protective of the rights of privacy than the Fourth Amendment which privileges the grand jury witness to refuse to answer questions predicated on unlawful electronic surveillance and then to litigate the legality of the electronic surveillance insures that the witness without a legitimate claim will more likely be returned to the stream of the grand jury process than the witness who, under the government's theory may be left to languish in jail during the life of the grand jury.

POINT III

THE PROVISIONS OF RULE 42(b) F.R. Cr. P ARE APPLICABLE TO A GRAND JURY WITNESS'S ORDERLY REFUSAL TO TESTIFY

This appeal also raises the issue of whether proceedings under 18 USC § 1826(a) are "summary" or whether the procedures embodied in Rule 42(b) F.R. Cr. P. apply.

It is clear that Rule 42(b) F.R. Cr. P. applies where a witness is held in criminal contempt for an orderly refusal to testify, either at a trial or before a grand jury. United States v. Wilson, slip. op. #73-1574 (2d Cir. 11/28/73); United States v. Marra, 482 F.2d 1196 (2d Cir. 1973); United States v. Handler, 476 F.2d 709 (2d Cir. 1973). The hallmark of such a contempt is a sentence, the purpose of which is punitive rather than coercive and cannot be purged. Shillitani v. United States, 384 U.S. 364 (1966).

Section 1826(a) authorizes "summary" commitments for refusals to testify before a court or grand jury and the imposition of coercive sentences. Thus, proceedings under § 1826(a) are in the nature of "civil" contempt, at least, for the purposes of sentencing.

However, contempt proceedings are particularly difficult to characterize as wholly civil or wholly criminal for all relevent purposes.

In United States v. Alter, 482 F.2d 1016 (9th Cir. 1973) an immunized grand jury witness refused to answer on the ground that the questions derived from unlawful electronic surveillance of himself or his attorney. The government represented that there was no surveillance of the witness but refused to respond to the inquiry about the attorney. Upon the witness's continued refusal to answer he was cited for contempt pursuant to § 1826(a). Forty five minutes later a hearing was held to determine whether the witness should be held in contempt. The Court held that this procedure was insufficient to permit the witness adequately to prepare a defense.

The Court reasoned that, for purposes of the procedures to be followed, such a contempt was the same as a criminal contempt so that the provisions of Rule 42(b) were applicable:

> "At the threshold of Gelbard, the Court said that section 1826(a) was 'intended to codify the existing practice of the federal courts,' citing portions of its legislative history and Shillitani (408 U.S. at 42-43 n. 1, 92 S.Ct. at 2358). The unmistakable import of these observations is that section 1826(a) has no effect upon the procedural ground rules the Court had laid in cases anteceding that the enactment of the statute-rules which expressly forbade summary proceedings for such contempts. . . .

> we conclude that a proceeding in contempt to compel a federal grand jury witness to testify is civil enough to foreclose his claim that he has a constitutional right to trial by jury (Shillitani) and criminal enough to require the application of Rule 42(b) (Harris), a conclusion we reached less elaborately in United States v. Dinsio (9th Cir. 1972) 468 F.2d 1392. It follows, therefore, that Alter was entitled to notice prescribed by Rule 42(b) and to a reasonable time to prepare his defense, i.e. to show 'just cause' for refusing to respond.
>
> 482 F.2d at 1022-1023

In this case, appellant was held in contempt and seized by the marshals immediately upon his refusal to testify. Counsel objected to this procedure requesting a Rule 42(b) hearing. The court ordered a hearing for the following afternoon which, as in Alter, did not afford counsel an adequate opportunity to prepare a defense.

The only justification for "summary" contempt proceedings is where the contempt is committed in the actual presence of the court and immediate action is necessary to preserve the integrity of the court.[1]

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1 The conditions precedent to a finding of "summary" contempt as set forth in Rule 42(a) F.R. Cr. P.

Orderly refusals to testify, whether before a court or grand jury, whether the intended punishment be civil or criminal in nature, should never be punished summarily. The basic components of due process, notice and an opportunity to be heard, must be afforded before liberty may be forfeited under such circumstances.

POINT IV

THE DESCRIPTION OF THE IMMUNITY GIVEN TO APPELLANT BY THE GOVERNMENT'S ATTORNEY WAS WHOLLY MISLEADING. CONSEQUENTLY APPELLANT CANNOT BE HELD IN CONTEMPT

18 U.S.C. § 6002 (Pub. L. 91-452, Title III, § 201(a), 84 Stat. 927), provides that the immunity conferred under that section prohibits the "use" of that "testimony or other information compelled under the order [of immunity] (or any information directly or indirectly derived from such testimony or other information)", from being "used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." Id.

While § 6002 confers "use" as opposed to "transactional" immunity, nevertheless,

> "The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom . . . it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

Kastigar v. United States, 406 U.S. 441, 460-61 (1972).

Kastigar, upheld the constitutionality of § 6002 in the face of a claim that the "use" immunity granted thereunder was not co-extensive with the privilege against self-incrimination, the petitioner claiming that the Fifth Amendment required "transactional" immunity from any prosecution related to the scope of the investigation. In rejecting this claim, the Court, noted in addition, that prosecution by a state sovereign was impeded only to the same extent as the Federal government's use or derivative use of the testimony. Kastigar, supra, at 406 U.S. 459 n. 48, citing Gardner v. Broderick, 392 U.S. 273, 276 (1968). See also, Zicarelli v. Investigation Commission, 406 U.S. 472 (1972).

During the course of the grand jury proceedings in this case, government counsel explained to appellant the protection afforded to him by the grant of immunity and its scope:

> "This order states that it will give you immunity. By this we mean, sir, you have [use] immunity. By that I mean everything you say cannot be used against you in a Court of law."

P. 14, Transcript of Proceedings 1/23/74.

Subsequently, at a later time during the proceedings, the witness requested that the scope of the protection afforded him be explained:

"THE WITNESS: About this immunity, how does this affect me in any prosecution with federal or state about questions asked here?

MR. DEL GROSSO: Any testimony that you give here today cannot be used against you in any federal or state Court.

THE WITNESS: Is that with the Internal Revenue and everything?

MR. DEL GROSSO: That's right across the board. Anything you say today cannot be used against you. If the government should show independent evidence; that is, evidence independent of your testimony that can be used, however, anything you say cannot be used against you at any subsequent date that you may come before this grand jury. Do you understand that?

THE WITNESS: Yes."

p. 20, Id.

Despite the witness' (a layman) statement that he understood what the prosecutor had said, the description of the scope

of the protection afforded was wholly deficient. Counsel raised this issue before the district court but received no ruling. See pp. 10-11, transcript of proceedings of 1/24/74.

The explanation of immunity to the witness was grossly deficient in two respects.

First, the prosecutor never explained that the grant of immunity protected the witness not only from prosecution based upon the testimony uttered itself but from the utilization of the fruits of that testimony, its exploitation and indirect use in conformity with the "sweeping proscription" actually afforded. Kastigar, supra; Counselman v. Hitchcock, 142 U.S. 547 (1892).

Second, the prosecutor affirmatively misled the witness by informing him that it was merely his testimony that a state sovereign was prohibited from using against him rather than fully explaining that the protection afforded him by § 6002 from state prosecution was only as broad as the "use" prohibition imposed upon the federal government.

Thus, the prosecutor failed to fully inform the appellant (1) as to the breadth of his protection from Federal prosecution and (2) as to the limits upon his protection from state prosecution.

Compare, Murphy v. Waterfront Commission, 378 U.S. 52 (1964), in which the petitioners had been granted transactional immunity.

If the prosecutor was uncertain as to the correct answer to appellant's question, he should have requested the Court, at one of their numerous appearances before the judge, to advise the witness as to the scope of the immunity granted him. Under these circumstances, and even if neither the witness nor his counsel were misled, appellant could not be lawfully held in contempt. Stevens v. Marks, 383 U.S. 234, 245-46 (1966); Raley v. Ohio, 360 U.S. 423 (1959); People v. Masiello, 28 N.Y.2d 287, 321 N.Y.S.2d 577 (1971); People v. Tramunti, 29 N.Y.2d 28, 323 N.Y.S.2d 687 (1971); People v. Ruggiano, 39 A.D.2d 113; 332 N.Y.S. 2d 458 (2nd Dept. 1972); People v. Fornaro, 28 A.D.2d 908, 282 N.Y.S.2d 13 (2nd Dept. 1967). Cf. Bursey v. United States, 466 F.2d 1059, 1081 (9th Cir. 1972).

Since the explanation of the privilege given to appellant was doubly deficient and the protections afforded were not described with "unmistakable clarity", Bursey, supra, the contempt citation must be set aside.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS
THE JUDGMENT OF CONTEMPT
MUST BE VACATED
AND THE MATTER REMANDED
FOR A SUPPRESSION HEARING.

Respectfully submitted,

NANCY ROSNER
Attorney for Appellant

2/2/74. Received one copy
of Appellants brief.
U.S. v. Persico
Thomas P. Puccio
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